difficulties and predicaments. The respondent in mitigation had submitted that his father had died intestate and that his application for letters of administration was still in the hands of his solicitors. But, as was pointed out by the learned Deputy Public Prosecutor, the offence was in respect of his own private income and not that of his father's estate. Any way, that was the view of the matter which commended itself to the learned magistrate and encouraged him to impose a sentence of $25 on each of the three charges. To my mind, income tax offences are of a very grave character and I share the view of my learned brother Suffian J. in the case of *Public Prosecutor* v. *Choo Swee Huat.*[3]

It was submitted by counsel for the respondent that the offences under which the accused was charged in *Public Prosecutor* v. *Choo Swee Huat* and the offences under the present case are somewhat dissimilar, the former being failure to give notice of chargeability and the present case being failure to furnish returns within a stipulated time. Be that as it may, I am nevertheless satisfied that they are income tax offences under the same section 59 of the Income Tax Ordinance. It was again submitted by learned counsel that the charge was bad in law and that I should revise it under my revisionary powers. For my part I am satisfied that the charge is good in law and that the contention of counsel has no foundation.

In the circumstances one would have expected the learned magistrate to give the most earnest attention to the interests, not only of the respondent, but also of the public. He had failed to consider the foremost consideration of them all, viz. the element of public interest. It is too often nowadays thought, or seems to be thought, that the interest of the prisoner is the only consideration. Not enough consideration is given to the interest of the public.

With regard to sentence in income tax cases and, if I may be permitted to include cases under the Employees Provident Fund Ordinance, it is unfortunately true that until recently, possibly even at the present day as this case would suggest, there is a tendency for magistrates to impose "pin-prick" sentences which to my mind do not appear to the world at large as a deterrent. The tragic consequence would be that the efficacy of punishment as a system of general deterrence is impaired. I trust that in future cases of this nature magistrates will see fit to take a more serious view of the situation.

To my mind, the fine of $25 on each charge is manifestly inadequate and I shall impose a fine of $150 on each charge. Since the respondent has already paid $25, he has to pay a further $125 on each charge. I therefore allow the appeal.

Appeal allowed.

Solicitors: *Richard Talalla & Menon.*

ANGLO-AMERICAN CORPORATION LTD. v. CHIN PAK SOON & ANOR.

[O.C.J. (Raja Azlan Shah J.) February 5, 1966]

[K.L. — Civil Suit No. 555 of 1964]

Hire-purchase agreement — Judgment in default against hirer and guarantor — Judgment against guarantor set aside — Interim judgment against guarantor — Estoppel — Right of guarantor to seek indemnity from principal debtor — Contracts (Malay States) Ordinance, 1950, s. 98 — R.S.C. 1957 O. 54 r. 22A.

Practice and Procedure — Judgment set aside — Interim judgment — Estoppel.

This was a claim on a hire-purchase agreement relating to a tractor. The plaintiffs had obtained judgment in default of appearance against the hirer and the guarantor. Subsequently the second defendant (the guarantor) applied for the judgment to be set aside and an order was accordingly made. The plaintiff thereupon asked for interim judgment to be entered against the second defendant and this was granted. The second defendant applied for this interim judgment to be set aside under R.S.C. 1957, O. 54 r. 22A.

Held: (1) as the judgment against the defendants had been set aside the plaintiff was not estopped from making the application for interim judgment;

(2) in law the second defendant was entitled to be indemnified by the principal debtor and therefore in the circumstances of this case the interim judgment should be set aside.

Cases referred to:—

(1) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] M.L.J. 49, P.C.

(2) *Watt* v. *Mortlock* [1963] 1 All E.R. 388.

(3) *Bechervaise* v. *Lewis* (1872), L.R. 7 C.P. 372 at p. 377.

CIVIL SUIT.

A. D. Rajah for the plaintiffs.

K. A. Menon for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: This claim is one typical of a great many actions which now are being brought and which in recent times have been brought on hire-purchase agreements. The particular hire-purchase relates to the hiring of a tractor by the plaintiffs as owners to the first defendant as hirer and the second defendant as guarantor.

The statement of claim which is specially endorsed, *inter alia*, states:

"2. The second defendant in consideration of the plaintiffs having at his request agreed to hire to the first defendant the said tractor undertook and guaranteed the payments of the said rents and all other sums of money which may become payable by the first defendant under the terms of the said agreement and undertook to indemnify the plaintiffs against all loss, damage or expense which the plaintiffs may sustain by reason of the

neglect of the first defendant to observe or perform any of the stipulations on his part contained in the said agreement.

3. It was an express term of the said agreement that if any of the instalments should be at any time in arrears and unpaid the plaintiffs should be entitled without notice or demand to terminate the hiring and retake possession of the said tractor without prejudice to any claim for arrears of hire-rent or damages for breach of this said agreement and/or the plaintiffs should be entitled to terminate the said agreement such termination not to discharge any pre-existing liability of the defendants to the plaintiffs.

4. On or about the 10th day of May 1964 there was an amount of $19,788.00 in arrears and unpaid and thereafter the plaintiffs retook possession of the said tractor and duly terminated the said agreement.

Particulars.

Total amount due as at 10.5.64.	$39,575.00
Total amount paid.	19,787.00
Amount in arrears:	$19,788.00"

Judgment in default of appearance was entered against both defendants on 12th September, 1964. On 18th February, 1965, the second defendant filed a notice of motion to set aside the said judgment. In his affidavit he deposed, *inter alia*, that —

"I guaranteed payment to the plaintiff only in the event of the plaintiff being unable to recover against the first defendant and not as a principal.

(a) the judgment aforesaid is oppressive in that the plaintiff having repossessed the tractor has also retained the substantial payment of $19,787.00 paid by the first defendant to the plaintiff towards the purchase of the tractor and in addition thereto has obtained judgment for a further sum $19,788.00 being alleged claim for depreciation which in fact is in the nature of a penalty;

(b) by reason of (a) above I verily believe that the plaintiff has obtained judgment for more than the amount the plaintiff actually is due or entitled to (sic).

(c) ....I never guaranteed payment of the said sum or any other sum incurred by the first defendant on spares and miscellaneous account.

(d) for the reason set out in paragraph 4 hereof my liability to the plaintiff is not co-extensive with that of the first defendant who is the principal debtor".

On 31st May, 1965, the motion was allowed by Ong J. On 3rd August, 1965, the plaintiffs filed a summons in chambers asking for interim judgment against the second defendant for the sum of $19,788.00 as claimed in paragraph 4 of the statement of claim, interest and costs of $200.00 (being arrears of instalments). The case eventually came before me in chambers on 27th September, 1965, and I gave interim judgment as prayed. It is now re-opened under Order 54 rule 22A of the rules of the Supreme Court.

In support of the summons the plaintiff filed an affidavit, paragraph 3 of which is substantially in the same terms as that contained in paragraph 2 of his statement of claim. In reply, defence counsel in his affidavit referred to the judgment in default which was set aside by Ong J. Plaintiff's counsel there had applied to the learned judge that judgment in part, that is, to the extent of $19,788.00 in terms of paragraph 4 of the statement of claim relating to arrears of hire-purchase instalments should stand undisturbed, and that the order setting aside should relate to the remainder of the judgment debt included in the judgment in default. The learned judge declined to do so and made the order setting aside the whole of the judgment in default of appearance in the sum of $40,973.74. Defence counsel raised the plea of estoppel since he contended that the plaintiff's application was precisely the same as that made by plaintiff's counsel before Ong J. and which was refused.

The law which seems to cover the plea of estoppel is sufficiently contained in the judgment of the Privy Council in *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.*,[1] where at page 53 Viscount Radcliffe said:

"In their Lordships' opinion the *New Brunswick Railway Co.* case can be taken as containing an authoritative reinterpretation of the principle of *Howlett* v. *Tarte* in simpler and less specialised terms. This reinterpretation amounts to saying that default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham L.C. ([1939] A.C. at p. 21), they can estop only for what must 'necessarily and with complete precision' have been thereby determined".

Applying the law to the present case, I have to decide what the judgment of 12th September, 1964, can be treated as concluding between the plaintiff and the second defendant. Under that judgment the plaintiff was entitled to recover from the second defendant a sum of money by virtue of the hire-purchase agreement under which he stood as guarantor. The said judgment was afterwards set aside so that as it now stands there is no judgment alive and subsisting as against the second defendant. Is the plaintiff estopped from asserting in a fresh action the same facts as earlier pleaded? To my mind he would be estopped if the default judgment is alive and subsisting, but not otherwise. It cannot now be said that the default judgment had "necessarily and with compiete precision" decided on any issue between the plaintiff and the second defendant as the said judgment was set aside. In the circumstances I hold that there is no estoppel.

A further ground put forward by the second defendant was that he had in Civil Suit No. 1282 of 1965, filed on 20th September, 1965, asked for the declaration to be discharged and that he be excnerated from liability under the guarantee and that an order that the first defendant do pay to the plaintiff all sums due under the hire-purchase agreement. He submitted that cases of a similar nature have been granted relief. He referred to

the case of *Watt* v. *Mortlock* [2] and the cases therein cited as authorities in favour of the proposition. To my mind, these cases strongly support the defendant's case. However, I do not think it profitable to go into the merits of this argument in view of the pending Civil Suit No. 1282 beyond noting that in the light of those decided cases the second defendant is entitled to go to court to compel the principal debtor to pay what is due from him provided that the debt is ascertained. I may as well cite a passage from the judgment of Wiles J. in *Bechervaise* v. *Lewis*: [3]

"A surety has a right, as against the creditor, when he has paid the debt, to have for reimbursement the benefit of all securities which the creditor holds against the principal. This alone would not help the defendant here, because he has not, nor has the principal, actually paid the creditor, and in our law set-off is not regarded as an extinction of the debt between the parties.

The surety, however, has another right, viz. that, as soon as his obligation to pay has become absolute, he has a right in equity to be exonerated by his principal.

Thus we have a creditor who is equally liable to the principal as the principal to him, and against whom the principal has a good defence in law and equity, and a surety who is entitled in equity to call upon the principal to exonerate him".

If I am right, this principle of law is now embodied in section 145 of the Indian Contract Act, 1872, which reads:

"In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully".

Section 98 of the Contracts (Malay States) Ordinance, 1950, is in substance the same as the Indian provision.

In the circumstances I set aside my order in chambers and substitute an order that the application for interim judgment against the second defendant be dismissed with costs.

Order accordingly.

Solicitors: *Lovelace & Hastings; Richard Talalla & Menon.*

LEE LEE ENG v. PUBLIC PROSECUTOR

[A.Cr.J. (Ismail Khan J.) February 7, 1966]

[Malacca — Criminal Appeal No 5 of 1965]

Gaming — Chee fah — Whether a public lottery — Whether punters' slips are lottery tickets — Expert evidence — Common Gaming Houses Ordinance, 1953, s. 9(1).

The appellant was convicted of buying 4 lottery tickets an offence under section 9(1) of the Common Gaming Houses Ordinance, 1953. The appellant was found in possession of four slips of paper which were stated by the expert to be staking slips or punters' slips.

Held: (1) *chee fah* is a lottery within the meaning of the Common Gaming Houses Ordinance, 1953;

(2) the slips of paper being punters' slips are not lottery tickets within the meaning of the Common Gaming Houses Ordinance, and therefore the conviction of the appellant in this case must be quashed.

Cases referred to:—

(1) *R.* v. *Ang Tian Seng* [1958] M.L.J. 21.

(2) *Ong Yap Chang* v. *Public Prosecutor* [1962] M.L.J. 46.

(3) *Teo Ng Choon & Ors.* v. *Public Prosecutor* [1955] M.L.J. 58.

CRIMINAL APPEAL.

Edgar Joseph Jr. for the appellant.

Abu Talib bin Othman (Deputy Public Prosecutor) for respondent.

Cur. Adv. Vult.

Ismail Khan J.: In this case the appellant was charged with assisting in carrying on a public lottery, to wit, *chee fah*, an offence under section 4(1)(c) of the Common Gaming Houses Ordinance, No. 26 of 1953.

On 24th May, 1964, at about 8 p.m., the appellant was in front of Kuala Sungei Bharu market. He was walking in the direction of Kuala Linggi when he was stopped by Inspector Ramalingam who disclosed his identity to him. He then searched the appellant under a street light. From the appellant's trouser pockets the inspector took out four slips of paper (P1 - P4). The expert witness who examined these slips of paper described them as staking slips in a *chee fah* game. He said that any person in possession of such slips was a collector. In cross-examination he conceded that they could be punters' slips.

At the close of the prosecution case the charge was amended to read as follows:—

"That you on 24.5.64 at about 8.15 p.m. at Pekan Kuala Sungei Bharu in the District of Alor Gajah did buy 4 lottery tickets — *chee fah* lottery — and thereby committed an offence under section 9(1) of Ordinance 26/53."

The appellant claimed trial on the amended charged. Neither the prosecuting officer nor defence counsel wanted any of the prosecution witnesses recalled. The appellant was then called for his defence but elected to say nothing. In the event the learned magistrate convicted him and sentenced him to pay a fine of $200. Against this conviction and sentence he has appealed.

Two points were taken in this appeal. It was first contended for the appellant, as the expert witness had conceded in evidence, that in *chee fah* the distribution of prizes depended upon the deliberate selection by the promoter of the number least staked on. The element of chance in the distribution of the prizes, the basic ingredient of the lottery, is lacking and that therefore the game of *chee fah* is not a lottery.